Supreme Court, U.S.

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No._____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSEPH P. BAILEY

Petitioner,

-vs-

FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER FLORIDA HIGHWAY PATROL OFFICER ODNEY S. MOORE (#1219) HAD PROBABLE CAUSE AT THE TIME OF HIS DECISION TO ARREST PETITIONER FOR DRIVING WITH AN UNLAWFUL BLOOD ALCOHOL LEVEL, AND, IF NOT, THE INADMISSIBILITY OF STATE'S EVIDENCE, I.E., ALL ALCOHOL BREATH TEST RESULTS, AS FRUIT FROM THE POISONOUS TREE.

II. WHETHER THE INCOMPETENCE OF TRIAL COUNSEL DEPRIVED THIS PETITIONER OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE AND, AS SUCH, REQUIRES A REVERSAL OF HIS CONVICTION.

III. WHETHER THE TRIAL COURT DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM AND, AS SUCH, REQUIRES A REVERSAL OF HIS CONVICTION.

IV. WHETHER PETITIONER'S BREATHALYZER TEST RESULTS WERE ADMISSIBLE IN LIGHT OF THE USE OF STATE'S EXHIBIT # 3 FOR THE ANNUAL INSTRUMENT INSPECTION.

TABLE OF CONTENTS

Questions Presented For Review	i
Table Of Contents	iii
Table Of Authorities	v
Opinions Delivered By Other Courts	1
Statement Of Jurisdiction	1
Statement Of The Case	2
Reasons For Granting Writ	3
Question I	7
Question II	16
Question III	25
Question IV	28
Conclusion	30

Appendix:

Order On Appeal, Circuit Court, Criminal Division I, Eighth Judicial Circuit	1a
Denial, Writ Of Certiorari, District Court Of Appeal, First District	8a
Denial, Writ Of Certiorari, Supreme Court Of Florida	9a
Direct Examination, Trooper Virgil T. Sandlin, Florida Highway Patrol (FHP)	10a
Direct Examination, Trooper Rodney S. Moore (FHP)	22a

Cross Examination, Trooper Joe W. DeCoursey (FHP) 34a

For-The-Record Objection, Violation Of Sixth Amendment, United States Constitution 20a

TABLE OF AUTHORITIES

Cases:

Alexander v. United States, 390 F.2d 101 (5th Cir. 1968)

Barber v. Page, 390 U.S. 719 (1968)

Collins v. State, 65 So.2d 61, 63 (Fla. 1953)

Delaware v. Prouse, 440 U.S. 648 (1979)

Jones v. Barnes, 463 U.S. 745 (1983)

Mapp v. Ohio, 367 U.S. 643 (1961)

Powell v. Alabama, 287 U.S. 45 (1932)

People v. Michael, 394 N.E.2d 1134 (N.Y. 1979)

State v. Hoff, 591 So.2d 648 (Fla. 5th DCA 1991)

State v. Knoblock, 170 N.W.2d 781 (Wis. 1969)
State v. Mouser, et al., Alachua County Case No. 91-3592-MM

State v. Reisner, 584 So.2d 141 (Fla. 5th DCA 1991)

Strickland v. Washington, 466 U.S. 668 (1984)

Terry v. Ohio, 392 U.S. 1, 27 (1968)

United States v. Brignoni-Ponce, 422 U.S. 873 (1975)

United States v. Cronic, 466 U.S. 648 (1984)

United States v. Smith, 799 F.2d 704 (11th Cir. 1986)

Constitutional Provisions:

Constitution Of The State Of Florida, Article 1, Section 12

Statutes:

Rule 9.140(b)(3), Florida Rules Of Appellate Procedure

Florida Statutes § 90.902 (1991)

OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

On October 13, 1992, the Circuit Court, Eighth Judicial Circuit, In and For Alachua County, Florida affirmed Petitioner's November 25, 1991 conviction for driving while under the influence (DUI) of alcoholic beverages in violation of Florida Statutes § 322.282 (1989). On May 25, 1993, the District Court of Appeal, First District, State of Florida, denied a petition for writ of certiorari. On July 12, 1993, Petitioner's motion for rehearing to the District Court of Appeal, First District, State of Florida, was denied. On September 7, 1993, the Supreme Court of the State of Florida dismissed Petitioner's appeal on its own motion stipulating that it was without jurisdiction under Article V of the Florida Constitution and that no motion for rehearing would be entertained by the Court.

STATEMENT OF JURISDICTION

Jurisdiction to review this matter is

founded on Section 1257, Title 28, United States Code, wherein a final judgment or decree rendered by the highest court of a State in which a decision could be had is drawn in question on the ground(s) that it is repugnant to the Constitution, treaties, or laws of the United States.

STATEMENT OF THE CASE

On Thursday, July 18, 1991, at 11:24 p.m., Petitioner was stopped on S.R. 122 (Northwest 39th Avenue) in Gainesville, Florida for failure to drive within a single lane contrary to Florida Statutes Section 316.089(1). The stop was conducted by Trooper R. S. Moore (#1219) of the Florida Highway Patrol. Petitioner was administered a field sobriety test, was found to have failed this test, and was arrested on suspicion of DUI at 11:45 p.m.. Subsequent breathalyzer test results showed blood alcohol level readings of .135 percent and .134 percent. On November 25, 1991,

Petitioner was tried and convicted of DUI under Florida Statutes Section 316.09. He was assessed fines and costs totalling $487.50, was placed on probation for one year, and his driver's license was revoked for six (6) months pursuant to Florida Statutes Section 322.28. The Circuit Court, Eighth Judicial Circuit, In and For Alachua County, Florida affirmed the decisions of the Trial Court and the jury's verdict on October 13, 1992.

REASONS FOR GRANTING WRIT

The Petitioner, **Joseph P. Bailey**, prays for this Honorable Court to issue a writ of common law certiorari to review and reverse the conviction of DUI under Florida Statute Section 316.09, rendered by the County Court of the Eighth Judicial Circuit, In and For Alachua County, Florida, on November 25, 1991. In addition to an unsympathetic administrative and judicial process, highlighted by the callousness and indifference of the Circuit Court, Criminal

Division I, Eighth Judicial Circuit, In and For Alachua County, Florida, in failing even to properly identify the crucial chemical test evidence of this incident (identifying blood alcohol level readings of .15% and .14% instead of the proper levels of .135% and .134%), the proceeding(s) and conviction addressed herein are replete with perjured testimony, hearsay evidence, and experimental chemical testing rules and protocol(s) that are repugnant to the Constitution and laws of the United States and the rights, privileges, and immunities of its citizens. While Petitioner no longer resides in Florida and, by this means, has extricated himself from the "lawlessness" associated with his arrest and conviction, the criminal justice system responsible for these acts remains in place and continues to impinges on the rights, privileges, and immunities of its "average" citizens, and will, thereby, continue to instill a lack of confidence and a lack of public support. Finally, in addition to the

original fines and costs of conviction totalling $487.50, a year's probation, 50 hours of community service, and a revocation of driving privilege, Petitioner continues to suffer the indignity of a criminal background record maintained by the Federal Bureau of Investigation's National Crime Information Center, a circumstance that compromises Petitioner's opportunity to obtain a security clearance from his current Federal employer, and, thus, compromises his opportunity for career advancement. Such penalties, together with an automobile insurance rate that has increased from a semi-annual rate of $225.47 to a monthly rate of $243.41 (in spite of a 34 year driving record "marred" only by this arrest and conviction), appear far too unconscionable when predicated on the actions of a youthful, immature, and unscrupulous Florida Highway Patrol Officer, who being late for "roll call" on his 11:00 p.m. to 7:00 a.m. shift, and, needing an excuse for this tardiness,

exceeded probable cause to stop Petitioner for the offense charged. Possibly this officer was also compromised by the existence of a quota system established by the state of Florida for the enforcement of their DUI statutes.

Petitioner appeals the conviction cited raising the following issues:

1. Whether probable cause existed to arrest Petitioner for DUI at the time the arrest was made;

2. Whether Petitioner was denied his sixth amendment right to counsel due to the incompetency of trial counsel;

3. Whether Petitioner was denied his sixth amendment right to confront the witnesses against him by the admission into evidence of State's Exhibits #2 and #3 relating to the use of a breathalyzer; and

4. Whether Petitioner's breathalyzer test results were admissible in light of the use of State's Exhibit #3 for the annual instrument inspection.

QUESTION I

WHETHER FLORIDA HIGHWAY PATROL OFFICER RODNEY S. MOORE (#1219) HAD PROBABLE CAUSE AT THE TIME OF HIS DECISION TO ARREST PETITIONER FOR DRIVING WITH AN UNLAWFUL BLOOD ALCOHOL LEVEL, AND, IF NOT, THE INADMISSIBILITY OF STATE'S EVIDENCE, I.E., ALL ALCOHOL BREATH TEST RESULTS, AS FRUIT FROM THE POISONOUS TREE.

The Fourth Amendment, U. S. Constitution reads: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Amendment is applicable to the states through the due process clause of the Fourteenth Amendment and evidence obtained in violation of the proscription against unreasonable searches and seizures is subject to exclusion in the state courts, Mapp v. Ohio, 367 U.S. 643 (1961). Furthermore, the Constitution Of The State Of Florida,

stipulates at Article 1, Section 12, that:

> **"[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution."**

Thereby, at least in theory, the same standards of reasonableness and probable cause govern both the activities of the Federal government and the "law enforcement" processes and procedures of the State of Florida and its agents. In focusing on Florida case law re the application and availability of these Fourth Amendment

protections, one finds that, in determining whether an investigative stop of an automobile is invalid as pretexual, proper inquiry is whether a reasonable officer would have made the seizure in the absence of an illegitimate motivation. And while it is fairly well established that an officer may conduct a brief investigative stop of a vehicle, see Delaware v. Prouse, 440 U.S. 648 (1979), such a stop must be justified by specific, articulate facts sufficient to give rise to a reasonable suspicion of criminal conduct, Terry v. Ohio, 392 U.S. 1,27 (1968); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Investigative stops of vehicles are analogous to Terry stops, and are invalid if based only upon "unparticularized suspicion or hunch," 392 U.S. at 27. And even within the context of what appears to be the underlying legal presumption(s) of the Florida Highway Patrol toward DUI cases, i.e., that the Florida Highway Patrol is unrestricted in the stopping

of any driver exhibiting erratic driving patterns, be it to issue a traffic citation or to investigate whether the driver is intoxicated, the opportunity to stop a motor vehicle should not be expected to always rise to the level of an absolute discretion. With little more than an inarticulate "hunch" of illegal activity, an officer could begin following a vehicle and then stop it for the slightest deviation from a completely steady course. This possibility was denounced more than 30 years ago by the Florida Supreme Court in the case of Collins v. State, 65 So. 2d 61, 63 (Fla. 1953). In a case remarkably similar to the present situation, the United States Court of Appeals for the Eleventh Circuit, in United States v.Smith, 799 F.2d 704 (11th Cir. 1986), found that a Florida Highway Patrol trooper, who followed a car for about a mile and a half on an interstate highway and observed the car's right wheels cross over the white line about six inches into the emergency lane, and who observed

slight "weaving" within a single lane of the highway, did not have probable cause, under Florida law, to stop the car for a traffic violation.

In the present case, the arresting officer, Florida Highway Patrol Trooper Moore, testified that he (Moore) first observed Petitioner while he (Moore) was stopped at the intersection of Northwest 34th Street and Northwest 23rd Avenue heading north in the city of Gainesville, Florida on July 18, 1991. He also testified that Petitioner was weaving and driving in an erratic manner. Further testimony by Moore identified that, despite the purported weaving and other erratic driving behavior, Moore continued to follow Petitioner for a distance of approximately 1½ miles, including Petitioner's stop at a red traffic light and right turn to drive east on Northwest 39th Avenue, before initiating a stop of Petitioner's vehicle. What the facts of this case "patently" establish, although

not Moore's testimony, is that he (Moore) was heading toward the Highway Patrol Station approximately ten (10) minutes after he was to have reported for "roll call" to begin his 11:00 p.m. to 7:00 a.m. shift, and that there is no place in the city of Gainesville, Florida where Northwest 23rd Avenue crosses Northwest 34th Street. Based on Moore's very "malignant" descriptions of Petitioner's driving behavior, why did it take Moore approximately two miles to decide that a traffic violation had occurred? Also, why was it the case that Moore, after making the stop, then issued very intricate instructions to Petitioner directing Petitioner to restart his car, precede for another quarter mile to the first driveway leading to the right, and to pull in and park with enough clearance for Moore's patrol car to follow? It is a matter of record that Petitioner followed these instructions perfectly. It must be noted, moreover, that the length of time and the distance involved in Moore's pursuit of

Petitioner's vehicle, together with Moore's decision to have Petitioner move his vehicle from the right-of-way of State Road (S.R.) 122 to a more secluded and distant parking lot, are not the actions of a reasonable officer who testified to observing Petitioner driving like a "falling down drunk." Clearly, a reasonable officer, especially one observing the driving patterns that Moore testified to observing, would have made a quick attempt to separate Petitioner from his motor vehicle. Moore's actions appear to support the conclusion that his stop and investigation were in pursuit of a less obvious agenda, e.g., to meet a DUI arrest quota, or as a reaction to some racial or attitudinal bias, or as an excuse for being late to work, and that his testimony supporting a more "reasoned" and neutral posture is mere misrepresentation. In the final analysis, Moore committed a perjury, if not about the driving behavior, then most assuredly about the fact that

Northwest 23rd Avenue intersects Northwest 34th Street.

Furthermore, it was the testimony of Florida Highway Patrol Trooper DeCoursey, the "back-up" officer to Moore, that within seconds of his arrival at the scene of Petitioner's stop, the Highway Patrol Dispatcher reported that an attempt to call someone to drive Petitioner's vehicle away had been unsuccessful. Trooper DeCoursey testified that he was unable to observe the sobriety test(s) administered to Petitioner because Trooper Moore had asked him to call a tow truck. Moore, in testimony preceding DeCoursey's appearance on the stand, testified that DeCoursey arrived toward the middle or end of the sobriety tests.

Clearly there is an issue of probable cause for arrest that the Circuit Court, Eight Judicial Circuit, dismissed with the statement that "[n]one of the legal authority cited by BAILEY supports the assertion that initiating arrangements for

the removal of a vehicle constitutes a de facto arrest[;] [i]n any case, the highly erratic driving which Trooper Moore testified he observed prior to stopping BAILEY would justify making such arrangements." Clearly, the Circuit Court did not distinguish between the probable cause that is necessary for an investigatory stop and the probable cause that is necessary for an arrest. The rulings of the United States Supreme Court, especially their ruling in Terry v. Ohio, 392 U.S. 1 (1968), would appear to demand this type of distinction. As such, Petitioner reaffirms his contention that Moore lacked probable cause to arrest him for DUI at the time the arrest was made, based on the following propositions: first, that Moore asked the Highway Patrol Dispatcher to have someone "tow" Petitioner's vehicle before encountering Petitioner face-to-face or before conducting a field sobriety test, and, second, that Moore's call for a tow constituted a de facto arrest without

probable cause.

QUESTION II

WHETHER THE INCOMPETENCE OF TRIAL COUNSEL DEPRIVED THIS PETITIONER OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE AND, AS SUCH, REQUIRES A REVERSAL OF HIS CONVICTION.

This Honorable Court has long recognized that the due process/fair hearing right to counsel, the Sixth Amendment right to counsel, and the equal protection right to counsel, are rights that are not fulfilled if counsel fails to provide effective assistance to the defendant. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932), Jones v. Barnes, 463 U.S. 745 (1983). In United States v. Cronic, 466 U.S. 648 (1984), this Court explained the relationship of the effective assistance requirement to the constitutional right to counsel, and the general nature of the quality of assistance it demands. Under the Cronic ruling, the function of the right to counsel, i.e., assuring fairness in the adversary process, necessarily requires that the

accused have a counsel who acts as their advocate and subjects the prosecution's case to a meaningful adversary testing. A violation of the right to counsel flows from a deficiency in counsel that causes the process to lose its character as a confrontation between adversaries. Under the ruling of Strickland v. Washington, 466 U.S. 668 (1984), the defendant, to establish constitutionally ineffective representation, had to prove incompetence and prejudice. There, the standard for establishing prejudice was whether there was a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different.

Within this context, Petitioner proffers that trial counsel failed to depose any of the State's witnesses, failed to introduce evidence of Petitioner's prescription drug regimen and its possible effects on Petitioner's physical condition and breathalyzer test results, and, finally,

that trial counsel violated Rule 9.140(b)(3), Florida Rules of Appellate Procedure, by refusing to represent him on appeal. Significantly, if not the gravamen of trial counsel's incompetence, is the fact that trial counsel misinformed Petitioner that he had deposed all of the State's witnesses and would utilize Petitioner's prescription drug history as an affirmative defense. Without these deceptions, Petitioner would have secured the services of another trial advocate. Furthermore, Petitioner asserts that his trial counsel failed to explain gaps and take note of inconsistencies in the testimony of the State's witness, e.g.,

(1) Why was Trooper Moore heading north toward the Highway Patrol Office in Gainesville approximately ten minutes after he was to have reported for the roll call that should have begun his 11:00 p.m. to 7:00 a.m. shift?

(2) Exactly where was Moore located when

he first observed Petitioner and his vehicle? While Moore testified that he first observed Petitioner at the intersection of Northwest 23rd Avenue and Northwest 34th Street, this is physically impossible. At no location in the city of Gainesville, Florida does Northwest 23rd Avenue cross Northwest 34th Street. This factual error, if it had been pursued by trial counsel, would have had an impact on Moore's credibility as both a trooper and a witness.

(3) At what time was the Highway Patrol Dispatcher requested by Moore to dispatch a tow truck to drive Petitioner's vehicle away? Also, what was the time sequence between this request and the request by Moore to have Trooper DeCoursey as his "back-up?" It would not appear to be the normal routine of the Florida Highway Patrol to accept, or expect, that a "backup" would be the personal friend of the individual requesting the "backup" assistance. Was there a hidden motive and/or goal behind Moore's specific request for

DeCoursey's "backup" assistance? It would have also helped in the understanding of the facts of this case to have identified the exact time when the Dispatcher notified DeCoursey to join Moore.

(4) Why did Moore specifically request DeCoursey to provide "back-up?" Was it to ensure a corroborating witness? It is a matter of record, that DeCoursey, with twenty-one years of experience in the Florida Highway Patrol and in administering field sobriety tests, not to mention extensive training to sharpen his talents for detailed observation, could not testify as to what stage of the field sobriety test was being administered to the Petitioner when he arrived;

(5) Why was there an inconsistency between the descriptions of Moore and DeCoursey that identified Petitioner as a "falling down drunk" and the actual breathalyzer test results identifying a blood alcohol level of only .135 percent and .134

percent, i.e., a breathalyzer test result of .134 percent is not the reading of a "falling down drunk," especially if that person weighed the 230 lbs. that Petitioner weighed at the time of his arrest;

(6) Why were the obvious misrepresentations of Moore and DeCoursey not properly addressed during the course of cross-examination? Despite Moore's testimony that Northwest 34th Street intersects with Northwest 23rd Avenue, it is an obvious fact that there is no place in the city of Gainesville, Florida where Northwest 23rd Avenue crosses Northwest 34th Street. Furthermore, when DeCoursey, presented by the State as an expert on the operation of the breathalyzer machine used in this case, testified that the difference between the sequential readings of .134% and .135% represented test results that were coming down from a higher reading, there was no attempt by counsel to address the obvious contradiction

introduced during the testimony of Florida Highway Patrol Officer Virgil T. Sandlin that it was a normal margin of error for sequential readings to be different by a standard between .095 per cent and .105 per cent.

(7) Petitioner's trial attorney also failed to explore and dramatize the excruciatingly sinister circumstance whereby Moore ordered Petitioner's automobile to be towed, i.e., a circumstance establishing a de facto arrest, before he (Moore) had administered any field sobriety tests. The facts of the case establish that Petitioner was stopped at 11:24 p.m. and arrested on suspicion of DUI at 11:45 p.m., a mere 21 minutes later. By his testimony, Moore described that he administered four field sobriety tests to Petitioner, that the Petitioner did in fact pass the balance-alphabet test, and that Trooper DeCoursey arrived at the scene of the field sobriety

testing in the middle or end of the testing cycle. Moore also testified that he began the field sobriety testing within 5 minutes of the stop. DeCoursey, for his part, testified that within seconds of arriving at the scene, the Dispatcher came on his (DeCoursey's) radio and identified that the Dispatcher was unable to call someone to drive Petitioner's car away. Based on this testimony, the call for a tow could only have been made before Moore had completed the field sobriety tests, and, in the absence of any description by Moore that he interrupted his testing to call for a tow, would have to have been requested before the field sobriety tests were started. Even with Moore's request for a tow "preordaining" his conclusion that Petitioner failed the sobriety testing, it is interesting that the Petitioner was given credit for passing one of the four tests that were administered. Clearly, the arrest was made before the field sobriety tests had been started, and without

the benefit of probable cause. Even if Moore's description of erratic driving behavior were even mildly accurate, a multitude of lawful reasons could explain such driving, e.g., sleepiness, medical problems, poor eyesight, and/or mechanical problems. In calling for a tow before conducting the field sobriety tests, Moore set himself up as the judge and jury on the reason(s) for the observed driving behavior, in total disregard of the Fourth Amendment protections against unreasonable search and seizure.

More extraordinary even than these deficiencies, however, is the fact that trial counsel intentionally kept Petitioner uninformed that he had failed to depose the State's witnesses until the weekend before trial. This deception precluded Petitioner from obtaining other trial counsel. Trial counsel has also failed to return a $300 witness fund that was established to hire defense witnesses, but never actually used

for that purpose.

While the Circuit Court, Eighth Judicial Circuit, Alachua County, Florida, by their Order On Appeal, dismissed the above testimony related issues as "establishing the credibility of a witness' testimony and, thus, must be weighed by the trier of fact, not an Appellate Court," precedent exists wherein it is established that Appellate Courts also have the authority to consider "plain errors affecting substantial rights of defendants," even though these errors were not pressed below. See, e.g., People v. Michael, 394 N.E.2d 1134 (N.Y. 1979); Alexander v. United States, 390 F.2d 101 (5th Cir. 1968); State v. Knoblock, 170 N.W.2d 781 (Wis. 1969). In this case, the trial record is adequate for consideration of the issues identified.

QUESTION III

WHETHER THE TRIAL COURT DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST

HIM AND, AS SUCH, REQUIRES A REVERSAL OF HIS CONVICTION.

Petitioner asserts that he was denied his sixth amendment right to confront witnesses against him by the admittance of State's Exhibits #2 and #3, relating to the breathalyzer instrument. State's Exhibit #2 is a photocopy of the HRS (State of Florida, Department of Health and Rehabilitative Services) original registration for the instrument used to determine Petitioner's blood alcohol level on the night of arrest. State's Exhibit #3 is a photocopy of the annual inspection for the instrument. Petitioner contends that the inability to question the signatories at trial blocked any attack on the reliability of the breathalyzer test and the standards used to establish intoxication levels. The Trial Court, in overruling the objections to the admittance of these Exhibits, found that the right to confront witnesses did not require the signatories presence because the documents

were self-authenticating under Florida Statutes Section 90.902. It remains, in the judgment of this Petitioner, that the application of Florida Statutes Section 90.902, permitted as a hearsay exception, directly negated the Constitutional privilege to confront one's accusers, and, more precisely, to cross-examine them, and, thereby, is "unconstitutional." See Barber v. Page, 390 U.S. 719 (1968). Even as a practical cannon of fairness, the application of F.S. 90-902 was wrong. The Trooper whose testimony was utilized to introduce these exhibits, Trooper Virgil T. Sandlin, was responsible only for conducting, on a periodic basis, a simulation of a breath test, utilizing solutions and procedures obtained from HRS. Trooper Sandlin did not calibrate the machine, did not have technical knowledge of its "inner-workings," and merely functioned to perform the simulations and to call HRS to repair the machine in the event that the machine "failed" the simulation.

QUESTION IV

WHETHER PETITIONER'S BREATHALYZER TEST RESULTS WERE ADMISSIBLE IN LIGHT OF STATE'S USE OF EXHIBIT # 3 FOR THE ANNUAL INSPECTION.

Finally, Petitioner urges that his breathalyzer test results were inadmissible in light of State v. Reisner, 584 So.2d 141 (Fla. 5th DCA 1991) and State v. Hoff, 591 So.2d 648 (Fla. 5th DCA 1991). In Reisner, the Court found Florida Administrative Rule 10D-42.02, requiring breathalyzer instruments to be checked annually for "accuracy" and "reproducibility," to be void for vagueness. Unlike Rule 10D-42.024, requiring monthly checks for "accuracy," Rule 10D-42.02 did not specify that a particular form be used for the annual checks. The form specified for monthly checks under Rule 10D-42.024, Form 1514 (1982), further defined what was meant by "accuracy" and "reproducibility," thereby eliminating the potential vagueness of Rule 10D-42.024. In Reisner, a revised Form 1514 (1986) had been used for the annual check of the instrument. Since the revised Form was

not specified by Rule 10D-42.02, and since there was no expert testimony proving that the revised Form was substantially similar to Form 1514 (1982), the Court found Rule 10D-42.02 void for vagueness. The Court concluded that the breathalyzer test results were inadmissible. In the present case, although the notation "HRS FORM 711, JUL. 82" appears on State's Exhibit #3, Petitioner contends, and the State does not dispute, that the Form is equivalent to Form 1514 (1986).

Unbelievably, the local judiciary from which this case is brought addressed this issue and ruled in State v. Mouser, et al., Alachua County Case No. 91-3592-MM, that the breathalyzer tests utilizing Form 1514 (1986), or its equivalent, are admissible. Apparently, Mouser is "premised" on the conclusion(s) of expert witnesses that a revised Form 1514 (1986), or an equivalent of this form, is similar to Form 1514 (1982) and, as such, cures all

constitutional defects. This Petitioner contends that this is not necessarily the case, and that the constitutional issues raised in the breathalyzer cases must be settled at levels higher than a County Court. It is of additional concern that Mouser is not a "published" decision, and is distinguished on its facts.

CONCLUSION

In evaluating the merits of this petition for grant of certiorari, Petitioner respectfully implores this Court to take notice of the failure of the Trial Court, and especially the Circuit Court, Eighth Judicial Circuit, in its Order On Appeal, to apply any reasonable standard of legal analysis and/or to demonstrate even rudimentary commitments to the fair and honest administration of law. It is especially telling that the Circuit Court, in rendering an unfavorable Order On Appeal, also confirmed in this published

decision each of the material issues of fact that Petitioner would expect to have to "prove" in order to prevail. Foremost in this regard is the Circuit Court's acknowledgement that Trooper DeCoursey arrived on the scene toward the middle or end of the sobriety test being administered to the Petitioner by Trooper Moore, and, within seconds of DeCoursey's arrival, a Highway Patrol Dispatcher reported to DeCoursey (by radio) that an attempt to call someone to drive away Petitioner's vehicle was unsuccessful. In making some spurious distinction about whether Trooper DeCoursey arrived on the scene within two minutes of the stop or within two minutes after hearing of the stop, the Circuit Court failed to recognize the more significant fact(s) that DeCoursey arrived on the scene before the sobriety test was completed, but long after the Dispatcher had been told by Trooper Moore to get someone to drive away Petitioner's vehicle. An equally important judicial error

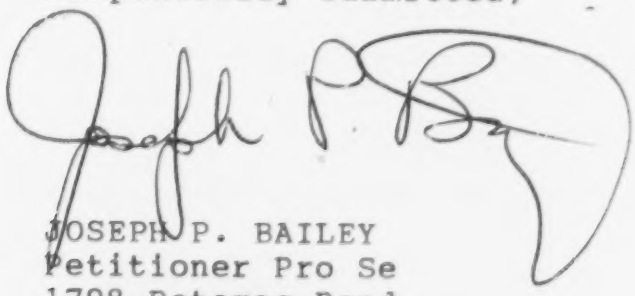
by the Circuit Court was their insistence that the highly erratic driving which Trooper Moore testified he observed prior to stopping Petitioner was sufficient justification for making arrangement's to impound Petitioner's vehicle. It apparently was of no concern to the Circuit Court that there is no legal foundation under Florida law for impounding a moving vehicle for the kind of erratic driving attributed to Petitioner and, even if there were, Trooper Moore did not make the "impound" arrangements with the Dispatcher to enforce a traffic citation for erratic driving, but, as he testified at page 25a, to "seize" a possible signal one driver, a possible DUI driver. In addition, the Circuit Court further dismissed Petitioner's argument that he was denied his sixth amendment right to effective counsel by deciding that trial counsel's failure to depose the State's witnesses was a trial strategy, and that the failure of trial counsel to introduce Petitioner's

prescription drug regimen was justified in order to prevent the introduction of Petitioner's use of "potentially addictive" prescription drugs. This, of course, is absurd logic. The deposition of a witness takes place before trial, and by its nature is not a trial strategy. The Circuit Court's reference to "BAILEY's use of potentially addictive prescription drugs" is a demeaning and speculative characterization. Finally, the Circuit Court acknowledges that State's Exhibit #3 was the same form, or the same equivalent form, found to be inadmissible in State v. Reisner, 584 So.2d 141 (Fla. 5th DCA 1991). Having found in Petitioner's favor on this fact, the Circuit Court then embraced some convoluted application of the concept of stare decisis in making an Alachua County Court decision, a decision that is not published and distinguished by its facts, overturn a "higher court" ruling by Florida's 5th District Court of Appeal.

WHEREFORE, Petitioner respectfully prays

that this Court grant certiorari, grant plenary review, and reverse the judgment of the County Court, In and For Alachua County, Florida, and remand the case for a new trial, with directions to suppress all evidence incident to Petitioner's arrest of July 18, 1991. Petitioner further requests that all records of this criminal proceeding be expunged.

Respectfully submitted,



JOSEPH P. BAILEY
Petitioner Pro Se
1798 Potomac Road
Fayetteville, N.C. 28304
(910) 485-3960

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA.

CRIMINAL DIVISION I.

STATE OF FLORIDA,

Appellee/Plaintiff, CASE NO.: 91-455-TC
APPEAL NO.: 91-5-AP

vs.

JOSEPH P. BAILEY,

Appellant/Defendant.

ORDER ON APPEAL

Appellant, JOSEPH P. BAILEY, ("BAILEY"), was tried and convicted of DUI, Florida Statutes Section 316.09, on November 25, 1991. He was assessed fines and costs totaling $487.50, was placed on probation for one year, and his driver's license was revoked for six months pursuant to Florida Statutes Section 322.28. He appeals his conviction raising the following issues:

1. Whether probable cause existed to arrest BAILEY for DUI at the time the arrest was made;

2. Whether BAILEY was denied his sixth amendment right to counsel by the alleged incompetency of his counsel;

3. Whether BAILEY was denied his sixth amendment right to confront the witnesses against him by the admission into evidence of State's Exhibits #2 and #3 relating to the use of a breathalyzer; and

4. Whether BAILEY's breathalyzer test results were admissible in light of the use of State's Exhibit #3 for the annual instrument inspection.

BAILEY requests that this Court reverse

the judgment of the County Court and remand the case for a new trial, with directions to suppress all evidence incident to the arrest of July 18, 1991. BAILEY further requests expungement of all records of this criminal proceeding.

At 11:24 P.M. on July 18, 1991, Appellant BAILEY was stopped on S.R. 122 (9th Avenue) in Gainesville for failure to drive within a single lane contrary to Florida Statutes Section 316.089(1). The stop was conducted by Trooper Moore of the Florida Highway Patrol. BAILEY failed a sobriety test and was arrested on suspicion of DUI at 11:45 P.M., according to the arrest report. The breathalyzer test showed blood alcohol level readings of .15% and .14%

During the trial, Trooper Moore testified that he stopped BAILEY's vehicle after observing it weaving in the traffic lane, crossing the double solid yellow line, braking repeatedly for no apparent reason, and swinging wide into the left lane when making a right turn, then returning to the right lane. He testified that upon approaching BAILEY after the stop, he noticed a strong odor of alcohol on BAILEY's breath, and that BAILEY was leaning up against his car for support. He also testified that Trooper DeCoursey arrived toward the middle or end of the sobriety test.

Trooper DeCoursey testified that upon hearing on the radio that Trooper Moore had stopped a vehicle driven by a person suspected to be impaired, he proceeded to the scene, arriving within two minutes. He testified that the sobriety test was in progress when he arrived, and that within seconds of his arrival, the Highway Patrol Dispatcher reported that an attempt to call someone to drive away BAILEY's vehicle was unsuccessful. Trooper DeCoursey testified that he was unable to observe the sobriety test because Trooper Moore had asked him to call a tow truck.

Appellant has not provided a complete record on appeal as required by Fla.R.App.P. 9.200(e). However, in resolving the issues presented by this appeal, the Court taken as true all facts set forth by BAILEY in his brief. BAILEY apparently independently transcribed portions of the trial proceedings on his own, and has submitted them as part of his initial brief and reply brief in this case.

BAILEY's first contention is that Trooper Moore lacked probable cause to arrest him for DUI at the time the arrest was made. BAILEY's claim is based on two propositions: First, that Trooper Moore asked the Highway Parole [sic] Dispatcher to have someone drive away BAILEY's vehicle before encountering BAILEY face-to-face or conducting a sobriety test, and second, that this action constituted a de facto arrest without probable cause.

The first proposition is not supported by the trial testimony which shows only that Trooper Moore contacted the dispatcher prior to Trooper DeCoursey's arrival on the scene. BAILEY claims that Trooper DeCoursey arrived on the scene within two minutes of the stop. But the testimony in the case shows only that DeCoursey arrived within two minutes after hearing of the stop. BAILEY's conclusion that Trooper Moore arranged for the removal of BAILEY's vehicle before encountering BAILEY face-to-face is therefore speculative.

Even if the first proposition were supported by the evidence, it would not constitute a de facto arrest without probable cause. None of the legal authority cited by BAILEY supports the assertion that initiating arrangements for the removal of a vehicle constitutes a de facto arrest. In any case, the highly erratic driving which Trooper Moore testified he observed prior to stopping BAILEY would justify making such arrangements.

BAILEY also asserts that Trooper Moore's

testimony was inaccurate or untruthful and therefore should not be accepted as a basis for establishing probable cause. The credibility of a witness' testimony must be weighed by the trier of fact, not by an Appellate Court. As a matter of law, therefore, BAILEY's claim that he was arrested for DUI without probable cause is without merit.

BAILEY further claims that he was denied his sixth amendment right to counsel by the alleged ineffectiveness of his trial counsel. Specifically, BAILEY alleges that his trial counsel violated Fla.R.App.P. 9.140(b)(3) by refusing to represent him on appeal, that he failed to depose any of the State's witnesses, and that he failed to introduce evidence of BAILEY's prescription drug regimen and its possible effects on BAILEY's physical condition and breathalyzer test results. In addition, BAILEY alleges in his reply brief that his trial counsel failed to "explain gaps" and "correct inconsistences" in the testimony of the State's witnesses.

To justify reversal of the conviction based on ineffective counsel, the Defendant must show, first, that counsels performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the Defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984). The standard for judging attorney performance is that of reasonably effective assistance. Judicial scrutiny of counsel's performance must be highly deferential. To show prejudice, the Defendant must show that there is a reasonable probability that but for counsels unprofessional errors, the result of the trial would have been different, i.d. at 694.

BAILEY's claim does not satisfy either prong of the Strickland test. His counsel's alleged refusal to represent him on appeal is irrelevant to the issue of his counsel's performance at trial. His counsel's decision

not to depose the State's witnesses or introduce evidence of BAILEY's use of "potentially addictive" prescription drugs could be justified on the grounds of trial strategy. The standard of reasonably effective assistance does not require that counsel expose every gap and inconsistency in the testimony of opposing witnesses. Thus, BAILEY has not shown that the trial counsel's performance was not reasonably effective.

In his reply brief, BAILEY asserts that his counsels [sic] failure to depose the State's witnesses prevent the raising of the "lack of probable cause for arrest" issue at trial and prevent his counsel from developing a strategy to impeach Trooper Moore's testimony until rebuttal. In light of the fact that the probable cause issue is without merit, there is not a reasonable probability that, but for the allegedly [sic] errors of BAILEY's counsel, BAILEY would not have been convicted. Therefore, BAILEY was not denied his sixth amendment right to effective counsel.

BAILEY claims that he was denied his sixth amendment right to confront witnesses against him by the admittance of State's Exhibits #2 and #3, relating to the breathalyzer instrument. State's Exhibit #2 is a photocopy of the HRS original registration for the instrument used to determine BAILEY's blood alcohol level. The document was signed by Howard Rarik, an HRS employee, and his seal was affixed. State's Exhibit #3 is a photocopy of the annual inspection for the instrument. The inspection document was signed by Sid Roberts (presumably an HRS inspector) and by Trooper Sandlin of the Florida Highway Patrol, as a witness to the inspection.

BAILEY contends that his inability to question the signatories at trial blocked any attack on the reliability of the breathalyzer test and the standards used to establish intoxication levels. The Court overruled the

objections to the admittance of these Exhibits, finding that the right to confront witnesses did not require the signatories presence because the documents were self-authenticating under Florida Statutes Section 90.902.

As the State points out in its answer brief, the opportunity to question the signatory of State's Exhibit #2 would add nothing to what the document purports to be on its face - namely, the original registration of the instrument.

With regard to State's Exhibit #3, defense counsel declined to question Trooper Sandlin, who testified at trial. In addition to witnessing the annual inspection, Trooper Sandlin was responsible for performing monthly preventive maintenance on the instrument. Therefore, BAILEY's contention that questioning Trooper Sandlin would not have sufficed because Trooper Sandlin did not calibrate the machine nor have technical knowledge of its interworkings carries little weight.

BAILEY's final argument is that his breathalyzer test results were inadmissible in light of State v. Reisner, 584 So.2d 141 (Fla. 5th DCA 1991). In Reisner, the Court found Fla.Admin.R. 10D-42.02, requiring breathalyzer instruments to be checked annually for "accuracy" and "reproducibility", to be void for vagueness. Unlike Rule 10D-42.024 requiring monthly checks for "accuracy", Rule 10D-42.02 did not specify that a particular form be used for the annual checks. The form specified for monthly checks, Form 1514 (1982), further defined what was meant "accuracy" and "reproducibility", thereby eliminating the potential vagueness of Rule 10D-42.024.

In Reisner, a revised Form 1514 (1986) had been used for the annual check of the instrument. Since the revised Form was not specified by Rule 10D-42.02 and since there was no expert testimony proving that the

revised Form was substantially similar to Form 1514 (1982), the Court found Rule 10D-42.02 void for vagueness. The Court concluded that the breathalyzer test results were inadmissible.

As noted in the State's answer brief, this issue was addressed locally in State v. Mouser, et al., Alachua County Court Case No. 91-592-MM. In Mouser, expert testimony showed that the revised Form 1514 (1986) entailed no changes affecting the Defendant's right to reliable test results. Other expert testimony showed that the training of breathalyzer operators and of personnel performing monthly preventive maintenance were in compliance with HRS rules. The Court concluded, therefore, that Reisner was not controlling and that the breathalyzer test results were admissible.

Although the notation "HRS FORM 71, JUL. 82" appears on State's Exhibit #3, BAILEY contends and the State does not dispute that the Form is equivalent to Form 1514 (1986). Even if this is true, BAILEY's reliance on Reisner is misplaced. Though it is not binding authority, Mouser indicates that the breathalyzer tests were admissable [sic].

It is therefore, ORDERED AND ADJUDGED that the decisions of the Trial Court and the jury's verdict are AFFIRMED.

DONE AND ORDERED this 13th day of October, 1992.

Original Signed By
Robert P. Cates,
Circuit Judge

ROBERT P. CATES
Circuit Judge

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, FL 32399-1850
Telephone (904) 488-6151

DATE May 25, 1993

CASE NO. 92-3942

JOSEPH P. BAILEY v. STATE OF FLORIDA

Appellant/Petitioner Appellee/Respondent

BY ORDER OF THE COURT:

The petition for writ of certiorari is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Original Signed By
Jon S. Wheeler, Clerk

Jon S. Wheeler, Clerk

By: _____
Deputy Clerk

Copies:

Joseph P. Bailey
Robert P. Cates

James W. Rogers

SUPREME COURT OF FLORIDA
TUESDAY, SEPTEMBER 7, 1993

JOSEPH P. BAILEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 82,218

DISTRICT COURT OF APPEAL,
1ST DISTRICT - NO. 92-3942

It appearing to the Court that the notice was not timely filed and further that it is without jurisdiction under Article V of the Florida Constitution, it is ordered that the cause is hereby dismissed on the Court's own motion.

No motion for rehearing will be entertained by the Court.

A True Copy H
TEST:

cc: Hon. Jon S. Wheeler, Clerk
Hon. J. K. "Buddy" Irby, Clerk

Original Signed By
Sid J. White,
Clerk, Supreme Court

Sid J. White
Clerk, Supreme Court

w/copy to Circuit Judge
Mr. Joseph P. Bailey
Hon. Robert A. Butterworth

TESTIMONY AND PROCEEDINGS before the Honorable Peter K. Sieg, County Court Judge, Eighth Judicial Circuit, at the Alachua County Courthouse, Gainesville, Alachua County, Florida, on Monday, November 25, 1991, as reported by Joseph P. Bailey, Appellant Pro Se.

DIRECT EXAMINATION BY STATE'S ATTORNEY: (Of Trooper Virgil T. Sandlin).

Q Please state your full name and occupation for the ladies and gentlemen of the jury?

A Virgil T. Sandlin. I am employed as a Trooper with the Florida Highway Patrol.

Q Trooper, do your duties at the Florida Highway Patrol include the maintenance and operation of the breath testing equipment?

A Yes sir it does.

Q What training have you had regarding breadth testing equipment?

A I have had the basic forty-hour

course, and there is an eight hour additional training on each instrument. That you are qualified on the, certified on the Intoxilyzer 5000, and, in Toxanzer 3000.

Q What kind of follow-up training do you have for these instruments?

A You are required to, ah, complete a recertification course yearly. It is a eight hour class that you are required to complete.

Q Do you have any? I mean, could you detail your special training that you have with the Intoxilyzer 5000?

A I have been a certified operator on the Intoxilyzer 5000 for ah, about, almost eighteen months now. Ah. So that includes the operation and maintenance of the instrument.

Q Do you have a permit to operate the 5000?

A Yes sir I do.

Q Who issued you that permit?

A Ah. HRS.

Q And how do you qualify for that

permit?

A You, you've got to have, once you have your forty hour course, you've got, to have the eight hour qualification on it, that particular instrument.

Q I am going to show you what has been marked as State's Exhibit A for identification and ask if you recognize this document?

A Yes sir, that is a photostatic copy of my Intoxilyzer 5000 card, permit.

STATE'S ATTORNEY: Okay.

Q And is it kept in the ordinary course of business of the Florida Highway Patrol?

A Yes sir.

Q And are you a custodian of this record?

A Yes sir I am.

STATE'S ATTORNEY: Shown to Defense Counsel, without objection, move into evidence as State's Exhibit 1.

DEFENSE ATTORNEY: Okay.

Q Trooper Sandlin, you testified that

you perform routine maintenance on the 5000? How many times would you say you have done that in the past?

A On this particular instrument I have been. The instrument was put on-line August of 1990. I have been performing maintenance on that instrument monthly and I do approximately, oh, its about fourteen tests every time I do monthly maintenance on it.

STATE'S ATTORNEY: Okay.

Q Have you testified in court regarding the operation and maintenance of the 5000?

A Yes sir I have.

Q How many times?

A Around fifteen.

Q Have you ever been tendered as an expert?

A Yes sir I have.

Q On operation and maintenance? How many times would you say?

A Two times on that.

STATE'S ATTORNEY: Your honor, at this

time I would tender Trooper Sandlin as an expert in the operation and maintenance of the breath testing equipment.

THE COURT: Proceed.

Q Trooper, are you familiar with the 5000?

STATE'S ATTORNEY: I wont call this the Intoxilyzer 5000, I will just call it the 5000. Serial Number 662264.

A Yes sir.

Q Is that instrument registered with the Department of Health and Rehabilitative Services?

A Yes sir it is.

Q Let me show this, marked as State's Exhibit B for identification, and ask if you identify, can identify this document?

A Yes sir. This is the registration certificate for the Intoxilyzer 5000 located at the Highway Patrol Station here in Gainesville.

Q And is it kept in the ordinary course of business of the Florida Highway

Patrol?

A Yes sir.

Q Are you a custodian of this record?

A Yes sir I am.

STATE'S ATTORNEY: Again your honor, without objection, move into evidence as State's Exhibit 2.

DEFENSE ATTORNEY: Your Honor, I object. May we approach.

(Whereupon, there was discussion off the record, after which the following proceedings were held:)

THE COURT: This is going to take a few minutes, so I would like for you all at least, go to your, ah, jury room, and relax for a minute.

DEFENSE ATTORNEY: All right. Rebutting the second part of the State's argument which is that the document is self-authenticated. Under that standard, the person who signs the document says that it is true. All documents that have been notarized would be self-authenticating and come in as an

exception to the hearsay rule, and we know that is not true. Documents don't come in just because they are notarized. Ah. To be self-authenticating, the document has to have an official seal or an exemption from the Court.

STATE'S ATTORNEY: Your Honor, we can clear this up I believe.

Q Trooper, do you have the original of this document?

STATE'S ATTORNEY: I believe there is a seal on it. But the problem is. When it gets to, a photocopy, ah, the seal doesn't come out. Your Honor, this is the original document, ah, with the seal, and that is just a photocopy of that and you can see -- .

DEFENSE ATTORNEY: Your Honor, this is, this is the exact argument that I was making, that the seal, this guy's seal saying that this, ah, you know, I certify that this is true. It is just like any other notary your Honor, all he is saying under this seal is that his statement is a true statement.

THE COURT: Why does that fail to authenticate the document?

DEFENSE ATTORNEY: Because it is no different than if we had, if that was an affidavit with a notarization at the bottom, with him saying that it was true. Ah. It would be no different. It is not, I don't believe. Ah. Is there a number you are looking at, with regard to the hearsay exception?

THE COURT: Yes. 901.1. I'm, may perhaps not looking at the same you are. I am looking at -- .

DEFENSE ATTORNEY: Ah. I am looking at just the rules.

THE COURT: -- . Please refer on 90.902(4).

DEFENSE ATTORNEY: Your Honor -- .

THE WITNESS (Trooper Virgil T. Sandlin): If you look on the backside, I can see that it says HRS. You can read backwards.

DEFENSE ATTORNEY: Actually I can't, but I will take your help.

THE COURT: Nine zero two, parenthesis (1), parenthesis.

DEFENSE ATTORNEY: Right, that references back from four that says you have to have compliance with sections one, two, or three.

THE COURT: No. It says, ah, not to one parenthesis (b). Not four, but one.

DEFENSE ATTORNEY: Yes. No. I am sorry your Honor. I understood what you were saying. And understood that you were referencing back to that part before that says one, two, or three.

THE COURT: I believe that it is self-authenticating under the statute. With the, ah, -- .

DEFENSE ATTORNEY: I am sorry?

THE COURT: I say I believe it is self-authenticating under 90.901(1)(b), under the raised seal. And as long as a copy is --.

DEFENSE ATTORNEY: I have no objection to copy. That was not the basis of the objection.

THE COURT: Okay. Bring the jury in.

THE COURT: -- will be admitted then as State's Exhibit 2 -- .

Q Trooper Sandlin, when was the annual maintenance check performed on the 5000?

A For the 1991 year it was conducted on January 29, 1991.

Q Let me show you now what is marked as State's Exhibit C for identification and ask if you recognize that document?

A Yes sir. This is a copy of the annual inspection conducted by Sid Roberts, and I was present when he conducted the inspection of the instrument.

STATE'S ATTORNEY: Okay.

Q And are you a custodian of this document?

A Yes sir I am.

Q Is it kept in the ordinary course of business at the Highway Patrol Station?

A Yes sir.

STATE'S ATTORNEY: Your Honor, without objection, I would move State's Exhibit C into

evidence as State's Exhibit 3.

DEFENSE ATTORNEY: Same objection your Honor.

THE COURT: Is it identical?

DEFENSE ATTORNEY: No.

THE COURT: Situation as the last objection?

DEFENSE ATTORNEY: No Your Honor.

(Whereupon, there was discussion off the record, after which the following proceedings were had:)

THE COURT: Do you wish to renew the objection on this and prior objection?

DEFENSE ATTORNEY: Yes Your Honor. I would like to renew the objection to this document and I would like to -- , I would like to object to this document and renew my objection to a document previous, that came in under the signature power bar, -- , on the grounds that the admission of either or both of these documents is a violation of Mr. Bailey's rights under the Constitution of the United States, specifically, the Sixth

Amendment to the United States Constitution, which provides for a confrontation clause. The defendant shall be able to confront and cross-examine witnesses against him. These documents are coming to be part of the res gestae in this case and Mr. Bailey -- .

THE COURT: Okay. You have made your grounds, and I will overrule the objection based on Florida Statute 90.902 dealing with self-authentication. So this document will be admitted into evidence as State's Exhibit 3.

STATE'S ATTORNEY: Thank you.

TESTIMONY AND PROCEEDINGS before the Honorable Peter K. Sieg, County Court Judge, Eighth Judicial Circuit, at the Alachua County Courthouse, Gainesville, Alachua County, Florida, on Monday, November 25, 1991, as reported by Joseph P. Bailey, Appellant Pro Se.

DIRECT EXAMINATION BY STATE'S ATTORNEY: (Of Trooper Rodney Moore).

STATE'S ATTORNEY: Good morning Trooper.

A Good morning.

Q Would you please state your full name and occupation for the ladies and gentlemen of the jury?

A My name is Rodney Moore. I am employed with the Florida Highway Patrol.

Q How long have you been with the Florida Highway Patrol?

A I received my five year pin about a month ago.

Q Have you always worked in the Gainesville area?

A No. I have been here a year. Worked four years down in the St. Pete/Clearwater area.

Q With the Highway Patrol?

A Yes I did.

Q In that time with the Florida Highway Patrol have you come in contact with people before that you have suspected of driving under the influence of alcohol?

A Yes I have.

Q Could you approximate how many times?

A In the last four years, the four years down there, probably over 100 DUI arrests down there.

Q What kind of things led you to suspect that a person was under the influence in those previous cases?

A A lot of cases it was driving, the driving patterns. The odor of alcohol on the breath once you stop and talk to them. Their

speech. Their reactions. The overall reactions when you talked to them on the side of the road.

STATE'S ATTORNEY: Okay.

Q Trooper, were you on duty on July 18, 1991 at approximately 11:30.

A Yes I was.

Q And on that night did you come in contact with a person later identified to you as Joseph Bailey?

A Yes I did.

Q How did you come in contact with Mr. Bailey?

A On that particular afternoon, night rather, I was working the 11:00 p.m. to 7:00 a.m. shift. I was in route north on 34th Street to the station, to the Highway Patrol Station, when I came in contact with Mr. Bailey's vehicle at first.

Q At what point on 34th Street? You said Northwest 34th Street?

A Yes.

Q At what point on Northwest 34th

Street did you first come into contact with Mr. Bailey's vehicle?

A I was stopped at Northwest 23rd Avenue, going north, when I proceeded north through the green light, I noticed a vehicle in front of me going north also that appeared to be weaving at the moment. I just had got on and I really didn't pay it too much attention at first, but it got my attention more when it started to weave more erratically as we went north.

Q Was there anybody in front of this vehicle that you were following?

A Not that I can remember. Only thing that I can remember is just my vehicle and his.

STATE'S ATTORNEY: Okay.

Q Trooper, I am going to ask you to step down and to aid you in your testimony to refer to, you can diagram on this puzzle board here the street and where you saw -- . Just a, diagram the street and area, ah, where you first came in contact with Mr. Bailey? And

the way he, you observed his driving there?

(Whereupon, the Witness utilized a paper display board during which the following proceedings were had:)

A 34th Street in that area ia (pause) there is a bicycle lane that goes, going north, northbound, ah, should be a double solid line. This would be the northbound lane. The southbound lane, and also there is one bike lane over here. This would be, I guess you would call this 23rd. We were both going north. I was going north rather -- . South here. Ah. I don't remember was he in front of me from here or did he turn off of another street. More than likely and you will have to talk with him. Evidently, he was going home -- Alley Katz. Followed him north.

Q Can you diagram where, approximately where, you first saw?

A Probably right here. When I really noticed him. You notice driving -- .

STATE'S ATTORNEY: All right.

A He was going north and I was behind

him and I noticed the vehicle, which would be here, within his lane at first, and at times he crossed the dividing line into the bike lane, straddled the bike lane, back over it into his lane, and then straddled the double solid yellow line on 34th Street. Which is. There is no passing lane.

STATE'S ATTORNEY: Okay.

Q Now? This? 34th Street is this one lane going north and one lane going south?

A Yes it is.

STATE'S ATTORNEY: Okay.

Q So the traffic in this lane would be coming in the opposite direction?

A Yes. On that particular night. Was it Sunday? No, a Thursday night. Well anyway, traffic was light. There was. During that time I didn't notice any traffic coming south. We continued on north on 34th Street in the same driving pattern. Continued on up to 39th Avenue.

STATE'S ATTORNEY: Okay.

WITNESS: During this period I also

noticed the defendant's vehicle. The brake light was used. The master brake lights. He would brake for no reason. There was nobody in front of him. He would brake -- . He kept braking. He kept braking, which would indicate then, that there was something wrong with the vehicle or he was braking for no reason at all.

Q Trooper, what is the speed limit on 34th Avenue, 34th Street, in this area?

A If I am not mistaken. I think it is 35 miles an hour. Problem, once you get, there is also a school zone which would have a bearing on it -- .

Q Could you estimate Mr. Bailey's speed at this time?

A Ah. We were probably at the speed limit or sometimes below because of all the, the erratic driving, slowing down, speeding up, slowing down, speeding up. The braking. That's what. Possibly one of the main things that also clued me into the possibility -- .

Q Okay. Will you continue as you get

up to 39th Avenue?

A Okay. Once we got up to 39th Avenue, subject was still having the erratic driving and braking. When we got to 39th Avenue, which would be here, there is a turn lane there, for your right hand turning. Ah. Vehicle turned right on 39th Avenue on a red light. He stopped, ah, made his right turn. I followed him. Once we made the right turn at 39th Avenue, about a tenth of a mile down the road, I activated my red light and siren. Mr. Bailey stopped in the right lane, in the middle of the lane, he stopped. I -- and told him to pull down to the next available driveway, to pull in. He did do that. We pulled into a church. I don't remember the name of the church, but it was a church parking lot. Pulled into the parking lot and that is when I walked to his vehicle and talked with him.

Q Trooper Moore do you remember anything about the way Mr. Bailey took his right turn on 39th Avenue?

A There is. 39th Avenue. -- eastbound. There is a, there're two lanes for the east bound traffic. Mr. Bailey, when he made his right turn, he didn't turn into the right lane. He turned wide to the left lane, back over to the right.

STATE'S ATTORNEY: Okay.

Q And that is when? In this area? That is where you stopped him?

A Actually it was further east -- .

STATE'S ATTORNEY: Okay. You can sit down again.

Q Did you ask Mr. Bailey to get out of his vehicle?

A Yes, once he pulled into the parking lot of the church, I asked him to exit his vehicle and he did.

STATE'S ATTORNEY: Okay.

Q And, is there anything you noticed when he first got out of the vehicle?

A When Mr. Bailey got out of his vehicle, he closed the door, he used the vehicle to support himself, he never walked to

me. He used the car and leaned up against the car.

Q Okay. Where did you meet him?

A I met him at the driver's door. He stayed right at the driver's door once he got out. He leaned up against the car.

Q Was there any conversation that you had?

A Yes. I asked for his driver's license and registration for his vehicle, and explained to him the reason why I was stopping him.

STATE'S ATTORNEY: Okay.

Q During that conversation was there anything, an odor you can identify with his breath?

A Yes, he had a strong odor of some sort of alcoholic beverage about his breath. Ah. I. Ah. If I remember he went back in his car, he got his, he looked for his registration in the glove box, and he never produced one.

Q During the time that you were

talking with him, how was he standing?

A The whole while before the questioning started about the field sobriety testing, he used the car for support. Or he, basically he was leaning up against the car.

Q In your opinion, do you feel that he needed to use the car?

A Yes.

Q Why is that?

A Ah. I. Basically, I think he was drunk.

Q Trooper, did you in fact ask Mr. Bailey to perform some field sobriety tests?

A Yes I did.

Q Did you call for a back-up officer?

A No. At the time I. Trooper DeCoursey, who was also working the night shift with me. He. I think the dispatcher told him that I was attempting to stop a possible signal one driver, which is a possible DUI driver, and I gave the dispatcher my location and he came over toward the, I guess the middle, or the end of the sobriety

testing when he arrived.

Q So you had already started the test? Before he arrived?

A Yes.

TESTIMONY AND PROCEEDINGS before the Honorable Peter K. Sieg, County Court Judge, Eighth Judicial Circuit, at the Alachua County Courthouse, Gainesville, Alachua County, Florida, on Monday, November 25, 1991, as reported by Joseph P. Bailey, Appellant Pro Se.

CROSS EXAMINATION BY DEFENSE ATTORNEY: (Of Trooper Joe W. DeCoursey).

Q Trooper DeCoursey. Did I understand your testimony that you were calling for a tow while Trooper Moore was giving Mr. Bailey the field sobriety test?

A In essence, that is what I was doing. Yes sir.

Q So, would I be correct in understanding that you were calling for a tow because Trooper Moore was going to arrest Mr. Bailey for DUI?

A That was. That was my assumption. Yes sir.

Q And that was your assumption prior to Mr. Bailey completing the field sobriety test?

A I don't know if it was prior to, or after, or before, or during. I am not sure. See. I was not paying that much attention to what Mr. Bailey and Trooper Moore was doing at that point.

Q But, ah, you didn't unilaterally call for the tow?

A No. No. No. No. No. The time it took me to get from where I originally had been contacted by radio, until the time I arrived to where they were, the dispatcher had attempted to call someone to come out and drive the car away. At the time I arrived, within seconds after I arrived, the dispatcher came on and said there was no answer. So. And as that point it was when Trooper Moore told me there was no other number I could call. So that is when I requested the tow truck.

Q So you weren't with Trooper Moore or

Mr. Bailey, ah, out on 39th Avenue?

A Ah. Yes I was there. I was at the same location, at the church parking lot, with them.

Q No. I am sorry. Ah. Let me back up. When Trooper Moore testified that when he first stopped Mr. Bailey, Mr. Bailey stopped on 39th Avenue, and he, you weren't there? So you have no idea whether that happened or not?

A No. I don't have any idea what went on there.

(Whereupon, the Defense Attorney utilized a chalkboard, during which the following proceedings were had:)

Q And if this is 34th Street, just to orient you. And this is 39th. And this is east and this is north. Ah. Church parking lot would be here. Actually it is a driveway. The parking lot is back here?

A Well, it was dark. Yes. I am not sure.

Q And when you got there. Ah. Am I correct that Mr. Bailey was parked here and

Trooper Moore was parked behind him and you pulled in?

A Never. Never. Nope. Nope. Nope. I pulled on, across the roadway from them, by, to the rear of Trooper Moore's car. I was on the totally opposite side of the road.

Q Like this?

A That is correct.

DEFENSE ATTORNEY: Okay.

Q Ah. And at that time, Mr. Bailey was already out of the car?

A Oh yes. They were out. In the middle of the driveway I guess it was. You say.

Q And that is where Mr. Bailey was taking the field sobriety test?

A Yes.

Q And that is the test you weren't paying any attention to because you were calling for somebody to pick up his car? (pause)

Q And because you weren't paying attention to either Trooper Moore or Mr.

Bailey, you can't tell us any of the particularities of Mr. Bailey taking this field sobriety test?

A No. No sir I can't.

Q (pause) Are you aware that Mr. Bailey was stopped by Trooper Moore at about 11:24 in the evening that night?

A I knew it had to be eleven, twelve, something like that. I wasn't sure. I wasn't paying attention to the time at the time. It had to be about 11:30 when I initially learned of it though. Ah. Something of that nature.